



Comptroller General
of the United States

Washington, D.C. 20548

153810

Decision

Matter of: Premier Enterprises, Inc.

File: B-259027

Date: March 1, 1995

William J. Lyons for the protester.
Louise E. Hansen, Esq., and Colleen A. Morris, Defense Logistics Agency, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly rejected proposal based upon a pass/fail evaluation under a traditional responsibility factor without referral to the Small Business Administration is denied where the agency reevaluated and upgraded the protester's proposal to acceptable in response to the protest, but nonetheless concluded that the awardee's higher-priced, higher-rated proposal offered greater value to the government.

2. Contention that agency wrongly permitted awardee to correct its proposal price is denied where the agency followed the regulatory requirements for permitting such corrections.

DECISION

Premier Enterprises, Inc. protests the award of a contract to Coastal Gas Marketing Company under request for proposals (RFP) No. DLA600-94-R-0002, issued by the Defense Fuel Supply Center (DFSC), Defense Logistics Agency, to purchase natural gas for the Air Force Academy and for Fort Carson, in Colorado. Premier argues that the agency wrongly rejected its proposal without referring the question of Premier's responsibility to the Small Business Administration (SBA) for review, and wrongly permitted Coastal to correct a mistake in its proposed price.

We deny the protest.

BACKGROUND

The RFP here was issued on November 19, 1993, seeking proposals for both firm supply and firm and interruptible transportation of natural gas. The RFP's eight line items corresponded to eight locations in the Central region of the continental United States, one of which--line item 0005--included the Air Force Academy and Fort Carson. The RFP advised that multiple awards might be made and that the agency would select those proposals which represented the best value to the government, price and other factors included.

The evaluation scheme set forth within the RFP included three evaluation factors: source of supply/transportation access; experience; and technical/management approach and plans to meet government gas requirements. Under each evaluation factor there were several subfactors. At issue in this protest is one of the five subfactors under the technical/management approach factor--subfactor 3.d., entitled "methods to secure alternate supply sources, including both supply and transportation."

By the December 21 closing date, DFSC received four proposals, including proposals from Coastal and Premier. After an initial evaluation, the agency requested and received best and final offers (BAFO) on April 7, 1994. After the evaluation of BAFOs, the source selection evaluation team recommended converting the evaluation of two of the subfactors from a comparative basis of evaluation to a pass/fail determination. Under one of these two subfactors, subfactor 3.d., Premier was evaluated as unacceptable. Thus, the overall composite adjectival rating for Premier was unacceptable, while the final composite adjectival rating for Coastal was "above average."

Upon receipt of a second round of BAFOs (requested for reasons not relevant to this dispute), and after Coastal was permitted to correct an error in its price,² Premier was the lowest-priced offeror at \$911,646.80, while Coastal was

¹The adjectival ratings used by the agency were outstanding, above average, acceptable, marginal, and unacceptable.

²DFSC explains that Coastal's BAFO contained an apparent clerical mistake in that Coastal included a fuel loss charge under one of the sub-line items for line item 0005. When the agency pointed out that the government was responsible for the cost of any fuel loss, Coastal confirmed that it had made a mistake and asked the agency to delete the fuel loss cost.

the next low offeror at \$1,042,170.45.³ Since Premier's low offer was rated technically unacceptable, the contracting officer made award to Coastal. This protest was filed after DFSC denied Premier's agency-level protest by letter dated October 5.

As part of the agency's review in response to Premier's agency-level protest and its protest to our Office, the contracting officer concluded that the agency had erroneously evaluated Premier's proposal as unacceptable under subfactor 3.d, and that the evaluation should have been conducted entirely on a comparative basis, and not on a partial pass/fail basis as decided earlier. Accordingly, the contracting officer raised Premier's evaluation under this subfactor from unacceptable to acceptable, and made a written finding changing the basis of evaluation. In addition, the contracting officer concluded that even though the final composite adjectival rating for Premier increased to acceptable as a result of the reevaluation, Coastal's evaluation as "above average" justified selection of Coastal despite its higher price.

DISCUSSION

Premier argues that the agency improperly rejected its proposal based upon a responsibility factor without referral to the SBA for a certificate of competency (COC) review. According to Premier, evaluation subfactor 3.d--"methods to secure alternate supply sources, including both supply and transportation"--relates directly to Premier's capability to perform the project. Since Premier is a small business, it contends that the agency was required to refer any question about its acceptability under this subfactor to the SBA. DFSC responds that subfactor 3.d. did not involve a matter of responsibility, and that even if it did, Premier was not prejudiced because the agency has since raised Premier's score to acceptable, and concluded that the selection decision would have remained unchanged.

Premier correctly asserts that the use of traditional responsibility factors as evaluation criteria in a negotiated procurement must be consistent with the requirements of the Small Business Act. McLaughlin Research Corp., 71 Comp. Gen. 383 (1992), 92-1 CPD ¶ 422; see also

³The prices shown here represent the offerors' supply adjustment factor--i.e., the offerors' charge to the government for transporting the natural gas. This was the price that was evaluated for award. The total value of the contract to Coastal, \$7,923,947, also includes the price of the natural gas. The price of the gas is based on a variable supply index.

Data Sys. Analysts, Inc., B-255684; B-255684.2, Mar. 22, 1994, 94-1 CPD ¶ 209. Specifically, if an agency evaluates proposals under a traditional responsibility factor on a "go/no-go" basis--like the pass/fail scheme initially used here--and as a result finds a proposal from a small business to be unacceptable, the agency is required to refer the matter to the SBA for a final determination under COC procedures. Clegg Indus., Inc., 70 Comp. Gen. 679 (1991), 91-2 CPD ¶ 145.

Given the facts in this case, we need not decide whether the agency's initial evaluation of Premier's proposal under the subfactor at issue without referral to the SBA was proper since the contracting officer has made a written finding that the initial evaluation was erroneous and that under this subfactor Premier's proposal is acceptable, thereby negating any COC referral requirement. The contracting officer also made a written finding affirming her initial selection decision. In this finding, provided with the agency report on this protest, the contracting officer explained that the change in Premier's rating did not change her earlier assessment that Coastal's proposal offered the best value to the government.

Although Premier complains that our Office should not permit the agency to correct its evaluation after the fact, agencies are encouraged and expected to correct evaluation errors where it learns of them in response to a protest, see, e.g., Oklahoma Indian Corp., 70 Comp. Gen. 558 (1991), 91-1 CPD 558; ICF Technology, Inc.--Recon., 70 Comp. Gen. 394 (1991), 91-1 CPD ¶ 347. In addition, the agency's actions lead us to conclude that Premier was not prejudiced as a result of the agency's earlier use of a pass/fail or "go/no-go," evaluation approach, since under the corrected evaluation Premier's rating relative to Coastal's reasonably led the contracting officer to conclude that Coastal should be selected for award. See Donaldson Co., Inc., B-236795, Dec. 4, 1989, 89-2 CPD ¶ 514 (where agency discovered and corrected error in evaluation after receiving protest and

The contracting officer explains that even though Premier's proposal was acceptable, Coastal's proposal was superior to Premier's in every respect. For this reason, the contracting officer concluded that Coastal's higher price--approximately \$130,000 above Premier's price--was justified considering the superiority of Coastal's proposal. Absent a showing that such a cost/technical tradeoff was unreasonable, our Office will not overturn an agency's exercise of discretion in this area. University of Dayton Research Inst., B-245431, Jan. 2, 1992, 92-1 CPD ¶ 6. We see no evidence in the record to question the agency's decision here.

where, even with the correction, protester was not in line for award, protester was not prejudiced by agency's action).

In its comments on the agency report, Premier raises three additional issues--two of which have been rendered academic by the agency's decision to raise Premier's rating from unacceptable to acceptable under evaluation subfactor 3.d.⁵ The remaining issue is Premier's contention that the agency improperly permitted Coastal to correct its proposed price.

Under the procedures applicable to negotiated procurements, when a contracting officer suspects a mistake prior to award, he or she is required to advise the offeror of the suspected mistake, and request verification from the offeror. If the offeror requests permission to correct a mistake, the contracting officer may permit the correction provided that the mistake, and the price intended without the mistake, is established by clear and convincing evidence from the solicitation and the proposal. Federal Acquisition Regulation § 15.607. Given that the government's responsibility for fuel loss was set forth in the solicitation, and that Coastal's proposed price for fuel loss was easily identified in its proposal, and given that the agency followed the FAR requirements for evaluating such mistakes, we see nothing unreasonable in DFSC's decision to permit Coastal to correct this mistake. See PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799, et al., May 4, 1993, 93-1 CPD ¶ 366.

The protest is denied.

\s\ Ronald Berger
for Robert P. Murphy
General Counsel

⁵Premier alleged that the agency's overall assessment of its proposal as unacceptable was irrational given the assessment of the individual evaluation factors and subfactors. However, since the agency raised the overall rating of Premier's proposal to acceptable, this argument is academic. Likewise, Premier's complaint that its evaluation as unacceptable under subfactor 3.d.--related to securing alternate supply sources--was irrational given its evaluation as above average under subfactor 3.b.--related to securing regular supply sources--has been rendered academic because of the agency's decision to raise the overall rating of the proposal.